IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 138 OF 1988

Dr.Prakash B. Sultane,
Kolhapur. ...Applicant

V/s.

The Commissioner of Income-tax,
Kolhapur. ...Respondent

Mr.V.H. Patil with Ms.Asifa Khan for Applicant-Assessee.
Mr.Ashok Kotangle, Sr.Counsel for Respondent-Revenue.

CORAM : V.C. DAGA AND
A.S. AGUIAR, JJ.

DATED : AUGUST 9TH, 2005.

ORAL JUDGEMENT (PER A.S. AGUIAR, J.) :-

. By this reference, the following question of law has been referred for opinion of this Court under Section 256(1) of the Income Tax, 1961, by the Tribunal at the instance of the assessee Dr.Prakash Sultane, in R.A. Nos.614 & 615(PN) of 1986 arising out of ITA Nos.1603 & 1604 (PN) of 1985 for the assessment years 1982-83 and 1981-82.

> "Whether, on the facts and in the circumstances of the case the Tribunal is justified in law in holding that the income from assets received on

partition dated 1-1-72 to the extent of Rs.15,381/- for A.Y. 1981-82 and Rs.12,242/- for A.Y. 1982-83 was assessable in the hands of the assessee individual ?"

2. The factual matrix giving rise to the aforesaid question of law is as follows :-

. The assessee is a doctor by profession. His income from profession was assessable in his hands as an individual. The assessee was member of a bigger HUF which was partitioned on 1-1-72. At the time of partition and right upto 22nd January, 1980 the assessee was a bachelor. During all these years, the income from assets on partition was assessed in the hands of the assessee as his individual income. When the assessee got married on 22nd January, 1980, the assessee contended that immediately after his marriage, the income from the assets received by him on partition was required to be assessed as HUF income, the HUF consisting of himself and his wife. The ITO rejected the claim. Aggrieved by the said decision, the Assessee filed appeal before the AAC which was also rejected. Against this decision of AAC, the appeal was filed

before the Tribunal which allowed the appeal and set aside the order of AAC.

3. The assessee being unmarried was assessed by the ITO in the status of individual in respect of both, his professional income from medical practice as also income from the assets received by him on partition from the HUF. After the assessee got married on 22nd January, 1980, the assessee claimed before the ITO that he should now be assessed in the status of individual in respect of his professional income only and as regards, the income from assets received on partition from the HUF, he should be assessed in the status of HUF consisting of himself and his wife. The assessee, accordingly, filed two returns one in the status of individual in respect of his professional income and other in the status of HUF in respect of the income from assets received on partition from the HUF. The assessee before the ITO placed reliance on the judgment of the **Allahabad** High Court in the case of **Prem Kumar V/s. Commissioner of Income-Tax, (1980) 121 ITR 347** wherein the Court held "that the share belonging to the unmarried co-parcener does not lose its character and therefore, on the marriage of the unmarried co-parcener HUF comes into

existence and the income is assessable in the hands of such HUF." The Assessee also placed reliance on judgment reported in **74 ITR 190 (SC)**, **N. V. Narendranath V/s. Commissioner of Income-Tax and 101 ITR 776 (SC), Surjit Lal Chhabda V/s. Commissioner of Income-Tax, Bombay**.

4. The ITO observing that the decisions referred to by the Assessee were considered in the Judgment of **Madhya Pradesh** High Court in the case of **Commissioner of Income-Tax, M.P.-I V/s. Vishnukumar Bhaiya, (1983) 142 ITR 357** and relying upon the said judgment rejected the application of the assessee and continued to assess his income from the HUF property in his individual capacity. In the above case also, the assessee had obtained the share on partition before his marriage and on his marriage, had claimed the status of HUF. His claim was rejected on the ground that "until a son is born the status of the assessee would continue to be that of an individual." The ITO assessed the income of the assessee from assets received by him on partition as his individual income and continued to assess the same as the assessee’s individual income for the assessment years 1982-83 also.

5. In appeal, the AAC was of the view that the **Madhya Pradesh** High Court did not correctly lay down the position of law in the case reported in **(1983) 142 ITR 357 (supra)** upon which the ITO placed reliance and observed that the character of HUF property did not change in the hands of the assessee just because he is the sole surviving member and it cannot, therefore, be given the same treatment as would be given to the self acquired property of an individual. The AAC further noted the Madhya Pradesh High Court judgment is in direct conflict with the decision of the Supreme Court in **C. Krishnaprasad**'s case reported in **97 ITR 493** and its earlier Full Bench decision in **Commissioner of Income-Tax, M.P.-I V/s. Krishna Kumar (1983) 143 ITR 462** wherein the Court held that more than one male member is not necessary to constitute a HUF. The AAC also referred to the judgment of the Supreme Court in the case of **Surjit Lal Chhabda V/s. Commissioner of Income-Tax, Bombay (1975) 101 ITR 776 (SC)** wherein a clear distinction is made between property which is already joint family property and property which is the self-acquired property of an individual. The AAC Court observed that the assessee received the joint family property on partition and just because he received it as

a single coparcener, it would not become his separate individual property. Reliance is also placed upon the case of **Prem Chand, Sardarilal Changanlal V/s. Commissioner of Income-Tax, A.P. Hyderabad, (1984) 148 ITR 440** wherein the **Andhra Pradesh** High Court held that where HUF property was held by six coparceners and there was a partition the property received by the husband would be taxable in his hands as HUF property along with his wife, even though a portion was given tohis wife. The AAC, accordingly, held that the income from property received by the assessee on partition should be taxed as HUF property during the period after he was married.

6. In appeal, the Tribunal set aside the AAC's finding holding that the decision of the Madhya Pradesh High Court in the case of **CIT V/s. Vishnukumar Bhaiya (1987) 142 ITR 357**, relied upon by the ITO, represented the correct position of law. The learned Tribunal has referred to the following observations of the Apex Court in the Case of **Surjit Lal Chhabda (SC)** dated 6.10.1975, as of substantial relevance to the case at hand :-

> (1) "The wife and unmarried daughter are his family. He is not, by agreement, making them

so, And as a Hindu he himself can be the stock of fresh descent so as to be able to constitute an undivided family with his wife and daughter."

(2) "As wife, and married daughter were entitled to be maintained by him.....Their rights in the property are not enlarged for the reason that the property was thrown into family hotchpot".

7. On the basis of the aforesaid observations of the Supreme Court in the said case, the Tribunal gave its own findings as follows :-

"Thus there is no doubt that the character of the property originating from HUF funds does not acquire different colours depending on the number of births and deaths in the family. At the same time, the effect of marriage, which merely entitled the wife to maintenance, does not bring about any real change. The right of the wife is not enlarged for the reason that she was married to the assessee. Not being a coparcener the wife has no right by birth in the property nor the right to demand its partition

nor indeed the right to restrain the assessee from alienating the property for any purpose whatsoever.

. The Tribunal concluded as follows :-

"Thus, the event of marriage on 22.1.1980 has not made any difference as far as Dr.Sultane is concerned."

8. The Tribunal has also with approval referred to the distinction made by the departmental representative in cases in which at the time of getting share on partition, the assessee was already married and in cases where the marriage takes place after receipt of share on partition as in the present case. Reliance has been placed on the Judgment of the **Patna** High Court in the case of **Hanumangal periwal vs. CWT (1968) 67 ITR 320,** wherein it was observed that -

"There is a difference between a sole surviving coparcener in possession of ancestral property and a coparcener getting a moiety of ancestral property on partition. The difference lies in

> the character of the property. In the former case it is unbroken ancestral property of the joint family and the coparcenery unit is reduced to a single individual. In the latter case the property is a part of the ancestral property and the coparcenery is broken."

9. The Tribunal, thus, observed that once coparcenery is broken as in the present case, no additional interest gets created by virtue of marriage or birth of a daughter.

10. In support, the learned Tribunal has also relied on the following passage from **Mulla's commentary** on Hindu Law, Article 223 (4) page 294 15th edition :

> "The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently.... As regards other relations, it is separate property."

11. The Tribunal concluded by upholding that the event of marriage of the assessee on 22.1.1980 did not bring about any change in the property which remained absolutely vested in the assessee. The share obtained on partition on 1.1.1972 underwent a metamorphosis at the time of partition breaking the co-parcenery tie and making the property of the assessee absolutely as individual property and there could be no second metamorphosis at the time of marriage on 22.1.1980. The Tribunal further observed that such an occasion may arise on the birth of a son but till then the property will continue to be that of the same individual. The Tribunal claims to be fortified in its conclusion by the latest decision of the Supreme Court reported in **(1986) 161 ITR 370 in Commissioner of Wealth-Tax, Kanpur V/s. Chander Sen.**

12. We have heard learned Counsel for the Revenue and learned Advocate Mr.Patil for the Assessee. Before us, learned Advocate for the assessee placed reliance on the Judgment of **Gujarat** High Court in the case of **Commissioner of Income-Tax V/s. Parshottamdas K. Panchal reported in (2002) 257 ITR 96.** From the observations in the aforesaid case, the following ratio

has been culled :-

> "An individual who receives ancestral property at a partition and who subsequently acquires family, but has no male issue, would hold that property only as the property of the family. Under the Hindu law the wife of the co-parcener is certainly a member of the family. Whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same. Thus, in order to constitute a joint family, it is not always necessary that there must be two male members"

13. In the said case, the the assessee had received a share at a partition of a Hindu undivided family which was included in the hands of his father as he was a minor at that time. After he attained majority, he disclosed the share income in his return in the status of individual. When the assessee got married he filed the return and claimed the status of a smaller Hindu undivided family in respect of the share income obtained at the partition. The authorities below rejected the

claim on the ground that in order to constitute a joint family it is necessary that there should be two male coparceners but the Tribunal accepted the assessee's claim that his share income was not assessable in his individual assessment and directed the Income-tax Officer to modify the assessment.

14. In the aforesaid case, reliance was placed by learned Counsel for the Revenue on the Full Bench decision of the Patna Court in **Commissioner of Income Tax V. Shankar Lal Budhia, (1987) 165 (ITR) 380** in which the Patna High Court made reference to the case of **Surjit Lal Chhabda** wherein the Supreme Court had observed as follows :-

> "The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties, except to the extent to which a stranger may be affiliated to the family by adoption. But, the absence of an antecedent history of jointness between the appellant and his ancestors is no impediment to the appellant, his wife and unmarried daughter, forming a joint Hindu family. The appellant's wife became his

> sapinda on her marriage with him. The daughter too, on her birth, became a sapinda and until she leaves the family by marriage, the tie of sapindaship will bind her to the family of her birth. As said by Golapchandra Sarkar Sastri in his Hindu law (eight edition page 240), 'those that are called by nature to live together, continue to do so' and form a joint Hindu family. The appellant is not by contract seeking to introduce in his family strangers not bound to the family by the tie of sapindaship. The wife and unmarried daughter are members of his family. He is not by agreement making them so. And as a Hindu male, he himself can be the stock of a fresh descent so as to be able to constitute an undivided family with his wife and daughter."

15. Placing reliance on the aforesaid observations of the Supreme Court in the case of **Surjit Lal Chhabda**, the Gujarat High Court in **Parshottamdas Panchal's** case expressed the opinion that the distinction pointed out by the Supreme Court is very material for deciding as to whether the absence of a second sharer within the Hindu

undivided family renders what is otherwise joint family property, individual property. The Gujarat High Court observed that -

> "In cases where the property held by the person who claims it to be his own, had in fact been held by a joint family earlier and if ipso facto capable of being held by other shares as well in future if and when the family comes into existence and a son whether by birth or adoption is added thereto, such property continues to retain the character of joint family property even when the family is reduced to a single male member as in the case of a sole surviving coparcener. Though such a sole surviving coparcener may be assessable as an individual as he cannot be said to have a family, unless there are in fact present female members in the family, the character of the property continues unaltered as joint family property, though for the time being it is not shared with any other member of the family and may or may not be subject to any charge in favour of anyone else for any purpose."

16. In the said case of **Parshottamdas K. Panchal**, Gujarat High Court held that reliance placed by the counsel for the Revenue on the Full Bench decision of the Patna High Court in the case of Shankar Lal Budhia is of no avail to the revenue as the Full Bench of the Patna High had no occasion to consider the two Division Bench Judgments of the Gujarat High Court. Furthermore, it is contended that Supreme Court decision in **N.V. Narendranath** wherein the following observations were made, was also not considered by the Full Bench of the Patna High Court viz:-

> "An individual who receives ancestral property at a partition and who subsequently acquires family, but has no male issue, would hold that property only as the property of the family. Under the Hindu law the wife of the co-parcener is certainly a member of the family. Whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same. Thus, in order to constitute a joint family, it is not always necessary that

there must be two male members"

. The Gujarat High Court further observed in **Parshottamdas Panchal's** case as follows :-

> "What is emphasised by the court in the case of **Surjit Lal Chhabda v. CIT (1975) 101 ITR 776** (SC), is that two factors must coalesce : (1) there must exist a plurality of persons constituting a Hindu undivided family and (2) that the property which is to be treated as property belonging to the Hindu undivided family must be property which had been held earlier by a coparcenery in which a member of that family was one of the coparceners."

17. However, as noted earlier, the Tribunal has given its findings on the basis of the judgment of the Supreme Court in the case of **Chander Sen (SC)**, delivered on 16th July, 1986 much after to the decision of the Supreme Court in the case of **Surjit Lal V/s. CIT** which was delivered on 6th October, 1975 and upon which reliance has been placed by the Patna High Court in the case of **Shankarlal Budhia.** Since the case of **Chander**

Sen is also the latest decision of the Supreme Court referred to in these proceedings, it is necessary for us to go into the facts and law laid down in the said case of **Chander Sen**. Before that it is necessary to point out that the Judgment of the Gujarat High Court in the case of **CIT V/s. Parshottamdas K. Panchal** upon which the assessee is relying was delivered on 23rd January, 2001. The Gujarat High Court in the said case has placed reliance on (1) **Commissioner of Income-Tax V/s. Arun Kumar Jhunjhunwalla and Sons, (1997) 223 ITR 45**, (a decision of **Gauhati High Court**), (2) **Balkrishna Goyal Vs. Commissioner of Wealth-Tax, (1996), 218 ITR 617 Madhya Pradesh High Court (Indore Bench) and** (3) **Surjit Lal Chhabda V/s. CIT, (1975) 101 ITR 776 (SC).** Gujarat High Court while deferring from the decision of the Patna High Court Full Bench Judgment in the case of **Shankar Lal Budhia**, held "that a coparcener who receives ancestral property at a partition and who subsequently acquires a family, but has no male issue, would hold the property only as the property of a Hindu undivided family."

18. The Assessee has also placed reliance on the Judgment of Madras High Court in the case of **W.P.A.R.**

Rajagopalan V/s. Commissioner of Wealth-Tax, (2000) 241 ITR 344, wherein the ratio of the judgment of the Supreme Court in **Narendranath (N.V.) V. CWT (Supra) (1969) 74** has been followed and the case of **Shankar Lal Budhia** (Patna Full Bench) and **Vishnu Kumar** (M.P.) have been dissented from. The case of **Surjit Lal Chhabda** (SC) has been explained. It is pointed out that in the case of **Narendranath**, the Apex Court held that the ancestral property allotted to a member whose family consisted of himself, his wife and his daughter was the property belonging to the Hindu Undivided family and required to be assessed a such, notwithstanding the absence of a son who alone could claim partition. In that case, the two factors referred to earlier coalesced-there existed a family and the property was ancestral. The Supreme Court disagreed with the High Court which had held that in the absence of a son who could claim a partition, the property though ancestral was only to be assessed as individual property of the assessee therein.

19. The Madras High Court in **Rajagopalan's** case disagreed with the view taken by the High Court of Patna in the case of **Shankar Lal Budhia** and by the High Court

of Madhya Pradesh in **Vishnukumar Bhaiya** that in case where an individual received his share of the ancestral property on a partition and is assessed as individual, he should continued to be so assessed even after he acquires a family until such time he gets a son who can claim a share in the property.

20. In **Rajagopalan's** case, Madras High Court held that -

> "In cases where the property held by the person who claims it to be his own, had in fact been held by a joint family earlier and is ipso facto capable of being held by other shares as well in future if and when the family comes into existence and a son, whether by birth or adoption, is added thereto, such property continues to retain the character of joint family property, even when the family is reduced to a single male member as in the case of a sole surviving coparcener. Though such a sole surviving coparcener may be assessable as an individual as he cannot be said to have a family, unless there are, in fact, female joint

family members in the family, the character of the property continues unaltered as joint family property, though for the time being it is not shared with any other member of the family and may or may not be subject to any charge in favour of anyone else for any purpose."

21. Reliance has also been placed by the Assessee on the Judgment of **Madhya Pradesh High Court, Indore** in the case of **Balkrishna Goyal V/s. Commissioner of Wealth-Tax, (1996) 218 ITR 671** wherein the facts are identical to the case at hand. In the said case of **Balkrishna Goyal**, the assessee obtained property on partition which took place in 1955 among his grandfather, father and brothers. At that time, he was unmarried. Till the assessment year 1978-79, the returns were filed by him in the status of an individual. He got married on February 24, 1978. Thereafter, he submitted his income-tax and wealth-tax returns for the assessment year 1979-80 claiming status as Hindu undivided family in respect of the properties obtained by him in the partial partition. His status as Hindu undivided family was accepted by the Tribunal for the year 1979-80. However, for the subsequent years,

i.e. 1980-81 to 1983-84, the Wealth-tax Officer did not accept the status as Hindu undivided family in respect of those properties and took the status as an individual and this was confirmed by the Tribunal. In this case, the Madhya Pradesh High Court held that the Tribunal was not justified in rejecting the assessee's claim. The assessee was assessable in the status of a Hindu undivided family for the assessment years 1980-81 to 1983-84.

22. Thus, it is seen that the assessee has relied on the Judgments of several High Courts which in turn have referred to the observations of the Supreme Court in **Surjit Lal Chhabda**'s case and came to the conclusion that an assessee who has received share on partition of HUF property but subsequently gets married is entitled to be assessed in respect of the said share in the said property in the status of HUF.

23. The learned Tribunal in allowing the appeal and upholding the contention of the department that the event of assessee's marriage on 22.1.1980 did not bring about any notional change in the property which was absolutely vested in the assessee and therefore, could

not be assessed as HUF property claims to be fortified in its conclusions by the Judgment of the Supreme Court in the case of **Chander Sen** which is the latest judgment relevant to the point in controversy decided on 16th July, 1986. A perusal of the said judgment, however, discloses that the observations of the judgment therein, are based on facts which are different from the case at hand.

24. The facts of the case in **Chander Sen** are as follows :-

> "R and his son, C, constituted a Hindu undivided family. This family had some immovable property and carried on a business. On October 10, 1961, there was a partial partition in the family by which the business was divided between the father and the son and thereafter the business was carried on in partnership by a firm consisting of R and C as partners. The firm was assessed to income-tax as a registered firm and R and C were separately assessed in respect of their shares. On July 17, 1965, R died leaving behind his son, C, and his grandsons through C,

his mother and wife having predeceased him. On his death, there was a credit balance of Rs.1,85,043 in his account in the books of the firm. For the assessment year 1966-67, the question arose whether this amount belonged to the Hindu undivided family of C and his sons or C in his individual capacity for the purposes of wealth-tax. Similarly, at the close of the previous year relevant to the assessment year 1967-68, the amount stood at Rs.1,82,742 and the same question arose for this assessment year also. A sum of Rs.23,330 was credited towards interest on the credit balance at the close of that previous year and the question arose whether this amount was allowable as a deduction in the computation of the business income of the Hindu undivided family consisting of C and his sons for the assessment year 1967-68. The Appellate Tribunal held that the sum of Rs.1,85,043/- and Rs.1,82,742/- belonged to C in his individual capacity and did not constitute assets of the Hindu undivided family for purposes of wealth-tax and also that the interest of Rs.23,330/- was allowable deduction

in computing the business income of the family. On a reference, the High Court affirmed the decision of the Tribunal. On appeal to the Supreme Court :

Held, affirming the decision of the High Court, that since C had inherited the amount standing to the credit of his father, R, from whom he had separated by partition in relation to that asset, under section 8 of the Hindu Succession Act, 1956, that amount belonged to C in his individual capacity and did not constitute an asset of the Hindu undivided family of C and his sons. That amount could not be assessed to wealth-tax in the hands of that family and the interest credited to that amount was allowable as a deduction in computing the business income of that family."

25. Clearly, the reliance by the Tribunal on **Chander Sen**'s case is wholly misplaced. Hence, the observation of the Tribunal that - the event of marriage of the assessee on 22.1.1980 did not bring about any change in the property which remained absolutely vested in the

assessee, is unwarranted. So also the observations of the Tribunal that "the share obtained on partition on 1.1.1972 underwent a metamorphosis at the time of partition breaking the co-parcenery tie and making the property of the assessee absolutely as individual property and there could be no second metamorphosis at the time of marriage on 22.1.1980. Such an occasion may arise on the birth of a son but till then the property will continue to be that of the same individual" are untenable.

26. The observations of the Tribunal are self-contradictory: on one hand, it is stated that there could be no second metamorphosis at the time of marriage on 22.1.1980, on the other, it is admitted that such as occasion could arise on the birth of a son, thus, conceding that there could be a second metamorphosis and the property, though held by the assessee as his individual property till the time of his marriage on 22.1.1980 could again resume the character of HUF property on the birth of a son.

27. The Tribunal it seems erred in its conclusion on account of failure on its part to recognise the

conceptual distinction between 'Joint Family' and 'Coparcenary' which has been vividly brought out in the case of **Gowli Buddanna v. CIT Mysore (1966) 60 ITR 293** wherein the Apex Court has held as follows :-

> "Under section 3 of the Income-tax Act, not a Hindu coparcenary but a Hindu undivided family is one of the assessable entities. A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth as interest in the joint or coparcenary property, these being the sons, grandsons and great-grandsons of the holder of the joint property for the time being. Therefore, there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners. In Kalyanji Vithaldas v. Commissioner of Income-tax, delivering the judgment of the Judicial Committee, Sir George Rankin observed :

"The phrase 'Hindu undivided family' is used in the statue with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words 'Hindu coparcenary', all the more that it is not possible to say on the face of the Act that no female can be a member."

The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity also has no force. The expression "Hindu undivided family" in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and apparently the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members."

28. It is important to note that the property does

not lose its character merely because at one point of time there was only one male member or one coparcener. The dictum that "once HUF always HUF" has been accepted all along. In the said case of **Gowli Buddanna** (supra), the Apex Court quoted with approval the following observations of the Judicial Committee of the Privy Council in the case arising from Ceylon viz. **Attorney General of Ceylon v. A.R. Arunachalam Chettiar (No.2)** :-

> "...though it may be correct to speak of him (the sole surviving coparcener) as the 'owner', yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality: it is such, too, that female members of the family (whose members may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property ... it would not appear reasonable to

> impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners."

. The Supreme Court further noted that while dealing with the question whether a single coparcener can alienate the property in a manner not open to one of several coparceners, the Privy Council observed that it was:

> "...an irrelevant consideration. Let it be assumed that his power of alienation is unassailable : that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate it, that is what it remains. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener 'owner', he then attributed to his ownership such a congeries of rights that the property could no longer be called 'joint family

> property.' The family, a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the copareners. There is in fact nothing to be gained by the use of the word 'owner' in this connexion. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family."

. The Supreme Court in **Gowli Buddanna**'s case concluded as follows :-

> "Property of a joint family, therefore, does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which yielded the income originally belonged to a Hindu undivided family. On the death of

> Buddappa, the family which included a widow and females born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu undivided family."

29. Even in **Surjit Lal Chhabda**'s case (supra) the Supreme Court did not approve the theory that a joint family must have more than one male member. The reliance placed by the Revenue on the observations of the Supreme Court in **Surjit Lal**'s case is wholly misplaced as the property there which never belonged to the HUF was brought into the HUF in which there was no other male member and therefore, the Supreme Court held that there was in reality no change in the character of the property. In the case on hand, there is no dispute that the property obtained on partition by the assessee had all the characteristics of joint family property and continued as such notwithstanding the short interregnum during which the assessee happened to be the sole surviving member and therefore, assessed to tax as owner of the joint family property in his individual capacity. On the assessee's marriage, a joint family came into

existence, hence, the property became liable to be assessed as HUF property.

30. We, accordingly, answer the question referred to us for opinion in the negative i.e. against the revenue and in favour of the assessee.

(A.S. AGUIAR, J.) **(V.C. DAGA, J.)**